

A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence

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Social Science research refutes much of the conventional wisdom regarding judicial independence. Evidence abounds that American judges possess only a modest amount of independence and that their independence is politically-conditioned and used for ideological purposes rather than rights protection. I argue here that we must embrace these social scientific facts normatively and that, contrary to the traditional view, doing so poses no great difficulty. In fact, the political uses of and political conditions attending judicial independence are normatively desirable. They promote political accountability, contribute to stable and more pluralistic democratic governance, and fit perfectly in the system of mutual institutional interdependencies that the Framers wisely created.

I. INTRODUCTION

The term “judicial independence” refers to a set of normative and empirical claims about judges in their relationships with others. In making their decisions independent judges are free from pressure applied by outside actors. When they enjoy such safeguards as life tenure and protection against salary diminution, judges need not fear retribution from the public or powerful politicians. As a result, they can decide in accordance with the law, not dominant opinion or the desires of other branches. Several normative ends are thereby served. Even when unpopular, the rights and liberties expressed in legal texts can be effectively protected. Rule-of-law values are also promoted as all individuals and groups, weak or strong, are subject to the same legal rules.

Empirical, conceptual, and normative challenges to this model are abundant,¹ and this article fits squarely in that tradition. It synthesizes, from the sizable empirical literature on courts, several social science findings of direct relevance for judicial independence:

- Judicial independence does not guarantee such social goods as prosperity, stability, and human rights.
- Judges use what freedom they have to decide in accordance with their ideological preferences.
- Judges possess only a modest amount of independence.
- Judicial independence is a product of political conditions and incentives, not formal structural protections.

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¹ See, e.g., JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002)[hereinafter JUDICIAL INDEPENDENCE].

These are facts that any normative theory of judicial independence must acknowledge. Doing so, however, is not as difficult as might be expected. In fact, I view these research findings with relief rather than alarm and provide normative approval to each. Simply put, I argue that it is good that judicial independence is limited and politically conditioned, and it is good that judicial independence is used for ideological purposes and not rights protection.

As Burbank and Friedman note, too many scholars treat judicial independence as a "monolith," failing to provide contextual information by identifying on which courts they focus, or they concentrate exclusively on the federal courts, particularly the U.S. Supreme Court.² I commit the latter sin though not the former, relating political science research on the Supreme Court to several normative issues regarding judicial independence. I focus on the Supreme Court since that is my area of expertise, and significant normative disagreements remain that need to be addressed. I do concede, however, that judicial independence means something far different for "a trial court, deciding questions of fact and applying law in a hierarchical system of precedent" as compared to the Supreme Court, deciding momentous questions of public policy and creating binding precedent for other courts to follow.³ I also agree that state courts, the workhorses of the American judiciary, deserve more scholarly attention. With that qualification made, I now turn to the central task of exploring the normative implications of social science research regarding courts for the issue of judicial independence.

II. THE INSTRUMENTAL VALUE OF JUDICIAL INDEPENDENCE

Extravagant claims are made on behalf of judicial independence. It is regarded as a guarantor of a variety of noble ends—the rule of law, democratic stability, economic development, and human rights.⁴ Given their frequency, it is surprising that these claims have received such little empirical investigation and support.

Charles Cameron's review confirms that research into these presumed causal connections is quite skimpy.⁵ For example, he found no studies of the relationship

² Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE, *supra* note 1, at 9, 11.

³ *Id.* at 19.

⁴ See, e.g., MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971); Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195, 195–96 (2002); Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 63 (2000); Penny J. White, *It's a Wonderful Life, or is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 8 (1996).

⁵ See Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in JUDICIAL INDEPENDENCE, *supra* note 1, at 134, 144–45.

between judicial independence and democratic stability.⁶ With regard to judicial independence and economic development, Cameron reports that the Barro study found a "significant, and substantively important link between economic growth and 'rule of law values.'" ⁷ Yamanishi, however, found no connection between judicial independence and rule-of-law values.⁸ Additionally, the Yamanishi study failed to verify that judicial independence has a positive impact on economic growth.⁹ Finally, Keith reports that, although judicial independence provisions individually have only a small impact on human rights behavior by the state, the "combined impact" of several such provisions "is rather substantial."¹⁰

Lewis Kornhauser argues that "[j]udicial independence is not a necessary condition for either stability or [economic] development,"¹¹ pointing out that, although its judiciary lacks independence, Japan has had both a highly stable government and an impressive record of economic growth.¹² He additionally notes that nations in the OECD have achieved stability and prosperity, despite employing a wide variety of adjudicative structures.¹³

Walter Murphy approaches the issue more indirectly by exploring the effectiveness of several different systems of governance in achieving peace, prosperity, freedom from oppression, and stability.¹⁴ While acknowledging a variety of empirical limitations, he concludes that constitutional democracy (of which judicial independence is a significant part) yields important benefits, but also entails risks.¹⁵ For example, it effectively protects citizens from government, though not from each other; offers a "realistic" promise of peace; facilitates political stability (though unevenly); impoverishes the civic culture; and produces a "good record" with regard to economic growth (though it is outperformed by "coercive capitalism").¹⁶ Like

⁶ *Id.* at 144.

⁷ *Id.* at 143 (citing Robert Barro, *Democracy and the Rule of Law*, in GOVERNING FOR PROSPERITY 209 (2000)).

⁸ *Id.*; see David S. Yamanishi, Rule of Law, Property Rights, and Human Rights: An Empirical Study of the Effects (and Non-effects) of Legal Institutions (2000) (unpublished paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C.) (on file with author).

⁹ Cameron, *supra* note 5, at 143.

¹⁰ Keith, *supra* note 4, at 196–200. Unfortunately, Keith does not develop, in my view, adequately independent measures of "judicial independence."

¹¹ Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in JUDICIAL INDEPENDENCE, *supra* note 1, at 45, 52.

¹² *Id.* at 53.

¹³ *Id.*

¹⁴ Walter F. Murphy, *Alternative Political Systems*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 9, 11–14 (2001).

¹⁵ *Id.* at 10–16.

¹⁶ *Id.*

Kornhauser, Murphy alerts us to “the problem of multiple realizability”;¹⁷ even if judicial independence is proven to achieve a particular objective, alternative structures may do so as well.¹⁸

The question of whether judicial independence advances human rights deserves a closer look. This is the benefit most commonly cited by its proponents who claim that independent judges will vigorously defend text-based rights and liberties, even in the face of opposition by popular majorities or powerful politicians.¹⁹ Again, however, there are few studies that directly test this presumed linkage. Cameron only reports two, one by Brickman that indeed found “a strong, statistically significant and substantively important relationship between civil liberties and judicial independence,” and another by Yamanishi that more tentatively and unevenly links judicial independence with human rights.²⁰

While further study is certainly justified, both anecdotal evidence and logic should lower our expectations of confirming a substantial causal connection between judicial independence and human rights. First, the history of the court with the greatest degree of independence—the U.S. Supreme Court—has not taught us that independent judges will reliably defend constitutional liberties. For example, the Court did not protect free speech during wartime or the McCarthy era.²¹ It has more often than not ruled against politically vulnerable minorities—powerless workers in the *Lochner*²² and New Deal eras, homosexuals in *Bowers v. Hardwick*,²³ poor Latino children in *Rodriguez*,²⁴ and racial minorities in a variety of cases, including *Dred Scott*,²⁵ *Plessy*,²⁶ and *Korematsu*.²⁷ Gerald Rosenberg also reminds us that countries like England, France, and Australia that lack independent courts performed

¹⁷ Kornhauser, *supra* note 11, at 53.

¹⁸ Murphy, *supra* note 14, at 22–32; *see also* Kornhauser, *supra* note 11, at 53.

¹⁹ *See supra* note 4 and accompanying text.

²⁰ Cameron, *supra* note 5, at 144 (citing reports of Danette Brickman, *Judicial Independence and the Protection of Civil Liberties: Cross-national Empirical Analysis* (2000) (unpublished paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C.) (on file with author); Yamanishi, *supra* note 9.

²¹ *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951); *Barrenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

²² *Lochner v. New York*, 198 U.S. 45 (1905).

²³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

better than the U.S. in respecting civil liberties and protecting political dissent during the Cold War.²⁸

Additionally, there is clear and conclusive evidence that judicial support for civil liberties varies considerably. For example, O'Connor and Palmer's data from the 1993 to 1999 terms reveal dramatic differences in the percentage of pro-civil liberties decisions by Supreme Court justices—ranging from a high of 72% for Stevens to a low of 29% for Thomas and Rehnquist.²⁹ The proportion of pro-civil liberties decisions by the Court as a whole has also varied considerably: 79% for the Warren Court during the period of 1962 to 1968, compared to only 37% for the Rehnquist Court from 1993 to 1998.³⁰ These findings refute the traditional model's curious assumption that independent judges invariably advance civil liberties.

Finally, evidence casts doubt on the related claim that independent judges will override popular majorities in order to protect text-based rights and liberties. Research has consistently found that Supreme Court decisions reflect and vary with public opinion.³¹ Especially to the point is the finding of Marshall and Ignagni that the Court has ruled in favor of a civil rights, civil liberty, or equality claim far more often when supported by the public (73% of the time) than when opposed by the public (40% of the time).³²

Difficulties in verifying the link between judicial independence and such normative ends as prosperity and human rights should not be surprising given the typical failure to elaborate its logical underpinnings. For example, we are neither told why judges would be unusually and uniformly supportive of civil liberties or economic efficiency, nor why unsympathetic voters and politicians would be likely to put them into office. Certainly there are some exceptions to this customary oversight. For example, Cameron reasons that independent courts might help to promote economic growth because of their effectiveness in enforcing contracts and resolving economic disputes.³³ In another example, Murphy speculates how the "legitimizing

²⁸ Gerald N. Rosenberg, *Thinking About Judicial Independence* 10 (Mar./Apr. 2001) (unpublished paper presented at a conference sponsored by the American Judicature Society and the Brennan Center for Justice, University of Pennsylvania, Philadelphia) (on file with author).

²⁹ Karen O'Connor & Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 262, 267 (2001).

³⁰ LAWRENCE BAUM, *THE SUPREME COURT* 155 (7th ed. 2001).

³¹ See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 192 (1989); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 91 (1993); James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 551 (1995).

³² Thomas R. Marshall & Joseph Ignagni, *Supreme Court and Public Support for Rights Claims*, 78 JUDICATURE 146, 148 (1994).

³³ Cameron, *supra* note 5, at 141.

effect of judicial review . . . may quiet doubts among losers as well as neutrals," thereby contributing to political stability.³⁴

It is clear that there are significant weaknesses in the logical, statistical, and anecdotal support for a judicial independence-rights protection link. However, we need not be dispirited by this fact. Securing human rights through legal text and independent courts is not the most effective or desirable way to do so. Civil liberties are better protected through deliberative democratic processes than through independent courts acting with finality.

Judge Learned Hand warned us about both the futility and the danger of entrusting too much of the rights-protection enterprise to judges.³⁵ He wisely observed that:

"a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."³⁶

James Bradley Thayer similarly argued that " 'under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.' " ³⁷ That too is the lesson of Gerald Rosenberg's study of the Supreme Court's social reform efforts in such areas as civil rights, abortion, and rights of the accused.³⁸ Courts do not typically succeed when they try to vindicate affirmative rights like right to counsel for indigents, equal educational opportunity, or abortion access. Instead, the success of their rights-based initiatives has depended upon the willingness of other political actors to comply and provide implementation support.

We should, as a people committed to both democratic governance and human rights, be comforted by that message. Leaving the protection of rights to judges regarded as superior and supreme is elitist and hostile to democratic values. Furthermore, this "judicial monopoly . . . decreases the number of arenas in which constitutional dialogue occur[s and] is corrosive of constitutional literacy."³⁹ This elitist vision excludes citizens and their elected representatives from the legitimate

³⁴ Murphy, *supra* note 14, at 15. However, Murphy notes that the available evidence does not support this hypothesis. Public knowledge of and support for the Court is insufficient for it to play a legitimizing role. *Id.* at 35 n.33.

³⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 23 (1962).

³⁶ *Id.* (quoting Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 172, 181 (Irving Dillard ed., 1952)).

³⁷ *Id.* (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in *LEGAL ESSAYS* 1, 39 (Boston Book Co. 1908)).

³⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

³⁹ John E. Finn, *The Civic Constitution: Some Preliminaries*, in *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE*, *supra* note 15, at 41, 58.

task of choosing, shaping, and reshaping our fundamental values and ideals; "the constitutional enterprise" should instead be regarded as "a broadly democratic affair."⁴⁰

As Thayer argued, too heavy a reliance on judges to vindicate our rights and correct our moral and political mistakes is perilous in that the people may lose both the experience and the responsibilities of citizenship.⁴¹ In the same vein, Rosenberg's evidence challenges the wisdom of social reformers who succumb to the "lure of litigation" and invest their limited resources in winning legal rather than political victories.⁴² For example, he suggests that the predominantly legal strategy of pro-choice groups led them to let down their guard after *Roe v. Wade*,⁴³ forgetting the hard political work that necessarily and properly attends the creation and preservation of constitutional rights.⁴⁴ They were unprepared for the anti-abortion movement and the onslaught of legislative activity and new abortion restrictions that followed.⁴⁵ The lesson from a variety of failed litigation-based reform efforts is clear: public education, voter and group mobilization, and legislative lobbying are more certain (and of course more democratic) avenues to rights vindication than leaving that task to independent judges.

A final point is that even if we wanted to insure that judges advance civil liberties with great vigor and regularity, granting them independence is an uncertain, if not curious method of doing so. As previously noted, liberal judges (who are predominantly Democratic judges appointed by Democratic presidents) are significantly more likely to vote in favor of civil rights and civil liberties claims.⁴⁶ If the desired end is the certain *judicial* protection of those rights, a more logical and effective strategy would be to elect Democrats to the White House and Senate in the interest of placing more liberals on the bench. After all, the notable reductions in the Supreme Court's support for civil liberties claims that have occurred in recent decades can be directly tied to the election of Republican presidents and the conservative judicial appointments they subsequently made.⁴⁷ Judicial independence empowers all judges, regardless of their commitment to civil rights and civil liberties and is, thus, an odd and ineffective approach to the cause of human rights.

To summarize, the evidentiary and logical support for the linkage between judicial independence and human rights is weak. We need not despair, however. In

⁴⁰ *Id.* at 57–58.

⁴¹ BICKEL, *supra* note 35, at 21–22 (quoting JAMES B. THAYER, JOHN MARSHALL 103–04, 106–07 (Houghton Mifflin 1901)).

⁴² ROSENBERG, *supra* note 38, at 341.

⁴³ 410 U.S. 113 (1973).

⁴⁴ ROSENBERG, *supra* note 38, at 339–42.

⁴⁵ *Id.*

⁴⁶ See *supra* notes 29–30 and accompanying text. For a review of leading studies on this topic, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

⁴⁷ BAUM, *supra* note 30, at 154–57.

fact, a true commitment to human rights would recognize that judicial independence neither effectively nor democratically secures them and that there are superior alternatives to their vindication.

III. THE IDEOLOGICAL USE OF JUDICIAL INDEPENDENCE

The lack of evidence that judicial independence guarantees human rights is not surprising in light of a second fact revealed by social science: when given the opportunity to do so, judges decide in accordance with their ideological values. An extensive body of research confirms "the attitudinal model" which assumes "that judges—particularly appellate court jurists—view cases primarily in terms of the broad political, socioeconomic issues they raise and . . . generally respond to these issues in accordance with their personal values and attitudes."⁴⁸

Particularly for the U.S. Supreme Court, research has found considerable decision-making variation, predictable decision-making patterns, and ample evidence that those patterns are the product of personal ideology.⁴⁹ For instance, Baum reports substantial variation among the justices in the proportion of liberal votes cast in the 1998 term: 76% for Stevens, a range of 56% to 58% for the remaining members of the Court's liberal wing (Ginsburg, Breyer, and Souter), and 23% to 35% for the Court's conservatives (Kennedy, O'Connor, Scalia, Thomas, and Rehnquist).⁵⁰ Additionally, ideologically compatible justices like Scalia and Thomas vote together at very high rates (86%) while justices at opposite ends of the ideological spectrum like Stevens and Thomas vote together far less frequently (46%).⁵¹ Finally, changes in the Court's membership and ideological composition produce corresponding policy changes. For example, significant reductions in the Court's support for civil liberties occurred after the arrival of the Nixon and Bush appointees.⁵²

An important qualification that must be made is that how much freedom judges have to "vote their values" depends both on the nature of the issue and the level of the judiciary. For example, lower court judges will make thousands of spur-of-the-moment decisions, most of them on routine matters like criminal misdemeanors and traffic and divorce cases that afford little discretion. The opportunity for advancing their ideological preferences is far less frequent than for Supreme Court justices who

⁴⁸ DAVID W. NEUBAUER, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 410 (2d ed. 1997); see also *infra* note 50 and accompanying text.

⁴⁹ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 69 (1993); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995).

⁵⁰ BAUM, *supra* note 30, at 147.

⁵¹ *Id.* at 51.

⁵² *Id.* at 155–56.

decide fewer cases but ones often involving difficult, discretionary, and high-stakes policy choices.

Supreme Court justices enjoy considerably more decisional freedom than lower court judges. Yet studies of Supreme Court decision-making do not show that judicial independence is used for the noble end of providing consistent protection to text-based rights and liberties. Instead, research conclusively proves that judges use their freedom to advance their ideological preferences, which may or may not be consistent with the text or with a human rights agenda.⁵³

We need not regard this research finding as cause for concern, however. Judges pursuing their ideological preferences help to fulfill a variety of legitimate, democratic ends. For example, the existence of ideological patterns in judicial decision-making invites and enables informed public and elite scrutiny of judicial nominees. A good example (and a healthy development) is the considerable speculation about Judge Garza, a likely Bush nominee to the Supreme Court.⁵⁴ Politicians, reporters, and interest groups have long operated under the valid assumption that a judge's political views matter and that an inquiry into those views is quite legitimate. Because ideological patterns are typically apparent in the decision-making records of judicial nominees, presidents and senators who select judges are encouraged and able to shape the future direction of judicial policy.

Ideological decision-making by judicial appointees, once on the bench, then fulfills the expectations of the elected officials who have selected them. Judges who use their decisional freedom in this way are, in my view, fulfilling their democratic obligation. The ideological values reflected in a judge's decisions are a democratic proxy; elected officials have deliberately planted those values on the bench on behalf of their supporters and are, thus, democratically shaping judicial policy.⁵⁵ This view lends legitimacy to the Court's efforts in the early 1930s to protect the preexisting political consensus against economic regulation and to resist the dramatic new policy course represented by FDR's New Deal. It alternatively casts doubt on the legitimacy of the Warren Court's freewheeling egalitarian ventures, given that they were not the product of a prior electoral and political consensus.⁵⁶

In this sense, judges who decide in accordance with the value premises of their appointment can also enhance political stability. They do so by protecting past

⁵³ See *supra* notes 29–30 and 48.

⁵⁴ Alec C. Ewald, *Getting Ready for Garza? Judge Emilio Garza, Civil Liberties and the Politics of Judicial Selection*, 12 L. & CTS. 11 (2002).

⁵⁵ PERETTI, *supra* note 46, at 84–132.

⁵⁶ I have elsewhere tentatively offered a pluralist defense of the Warren Court that focuses on its expansion of interest representation and its promotion of a sense of fair play by tending to the concerns of "out" groups. Ambivalence more accurately characterizes my view of the Warren Court. I am concerned about any Court that so dramatically "free-lances," though I remain assured that political checks will effectively limit the success of its policy ventures. See *id.* at 219, 222–24, 232–33, 238, 242.

political bargains from being voided by a single election or short-term political trends, a normative end desired by the Constitution's framers. When a set of values or groups wins sufficient support in presidential and Senate elections, they are justifiably granted long-term representation on the Court. The "prize" that is won is right-thinking judges with life tenure. Those judges can help to insure that a fickle electorate cannot easily void prior policy commitments or quickly transform past winners into losers. A new value or policy consensus must win widespread and long-term approval represented by yet another set of right-thinking judges with life tenure.

This is similar, in general though not specific terms, to the Landes-Posner model (1975), which asserts that independent, textually-minded judges lend durability to the statutory privileges granted to interest groups, thus enabling legislators to charge higher rent from groups seeking legislative favors.⁵⁷ These judges are, much as I have argued, enforcing interest group bargains. However, in the Landes-Posner view, judges protect interest group bargains because of their adherence to norms of textualism and precedent.⁵⁸ In my view, judges (at least in cases involving significant policy issues) enforce interest group bargains because they personally favor those bargains. In the Landes-Posner view, independent judges enforcing legislative deals serve less than noble ends—enabling interest groups politics and satisfying the self-seeking motives of legislators.⁵⁹ In my view, judicial enforcement of interest group bargains can serve broader public purposes like political stability and interest representation. It is to this latter goal that I now turn.

It is commonplace to observe that the framers, in designing the Constitution, were strongly motivated by a fear of tyranny, particularly a majority tyranny that would likely develop in a democratic system. They went to great lengths to prevent a selfish majority from easily gaining control of government. For example, they adopted a representational scheme in which only the House of Representatives would be directly elected and elections would be staggered, both within the Senate and throughout the government. As a result, a momentary majority could not sweep into power in a single election. Additionally, power was divided between the three national branches of government and between the state and federal governments. With checks and balances, a majority would need to gain simultaneous control of these various governmental units, no mean task given staggered elections and the non-electoral selection of so many different officials.

⁵⁷ William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875–901 (1976). Several articles that extend or critique the model are: Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 CON. POL. ECON. 1–21 (1994); W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. OF LEGAL STUD. 165–75 (1979); Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 22 J.L. & ECON. 215–28 (1989).

⁵⁸ Landes & Posner, *supra* note 57, at 879, 883.

⁵⁹ *Id.* at 877–78, 880–85 (1975).

The thrust of the system is negative in the sense that no group, including a majority, can easily gain control of the government and enact its selfish policies. However, there is a positive aspect as well: every group, even a minority, has the opportunity to challenge, in a variety of institutional settings, policies it regards as harmful to its interests. Because each institution is designed differently in terms of selection method and term of office, the chances that a group will win in one of those arenas is increased. Additionally, due to checks and balances, one branch can effectively stop another branch (at least temporarily); victory in only one branch is all that is required.

Independent judges can thus provide valued assistance to a group seeking to stop a policy inimical to its interests. An independent judiciary offers interest groups not only hope, but a real opportunity to win some policy concessions. Judicial independence provides additional officials in an alternate setting with some power to grant policy assistance and is, thus, good for interest groups. It contributes to a more robust and democratic form of interest group politics. It may also be good for our sense of fair play and tolerance in a system that inevitably chooses winners and losers. As Walter Murphy has argued:

judicial review . . . allows losers in the political processes to appeal to judges rather than to heaven. By restricting the power of elected officials as well as of bureaucrats, constitutional democracy lowers the stakes of politics. If life, liberty, and property depended on the outcome of the next election, thoughtful citizens might be reluctant to accept that decision-making process unless it were grounded in a political culture that limits power and guarantees continued opportunities for political participation.⁶⁰

Although the judiciary can serve as an additional institutional site for groups to protect their interests, there are limits on the freedom of judges in choosing which groups to help. First, as previously argued, their predisposition to help certain groups over others is strongly influenced by those who selected them. The bench has in a sense been "programmed." Second, as the next section will argue, various political checks limit the power of judges to advance their preferences effectively.

IV. LIMITS ON JUDICIAL INDEPENDENCE

Although I ultimately conclude that American judges enjoy only a modest amount of independence, there are serious difficulties involved in making that appraisal. First, "the quantum and quality of judicial independence . . . may vary dramatically between courts in the United States," with federal courts generally possessing more than state courts and appellate judges more than trial court judges.⁶¹

⁶⁰ Murphy, *supra* note 14, at 15.

⁶¹ Burbank & Friedman, *supra* note 2, at 17.

Definitional disagreements pose additional problems in measuring judicial independence. For example, Ferejohn has famously distinguished between decisional independence and institutional independence.⁶² Burbank has criticized political scientists for erroneously equating political influence with political control and thus too quickly dismissing judicial independence as a myth.⁶³ Kornhauser finds considerable variability in the meaning of judicial independence not only between social scientists and legal scholars, but within each group as well.⁶⁴ He concludes that the definitional confusion is so great that judicial independence cannot be considered "a useful, analytical concept" and should be abandoned.⁶⁵ Rubin partially agrees, arguing that "independence" is a constructive concept, as long as we recognize its general utility in describing the interconnections among governmental units and eliminate its peculiar association with the judiciary.⁶⁶

Despite these various concerns, we can state with confidence that federal judges, including Supreme Court justices, are subject to significant limitations on their independence, both decisional and institutional. Congress can impeach judges, set and regulate jurisdiction, change the size of the bench, raise (or not raise) judicial salaries, allocate judicial staff and budgets, propose constitutional amendments, and revise statutory interpretations it dislikes. Congress also chooses whether and at what level to fund judicial policies. The President appoints judges (with Senate approval), influences the Court's agenda, and enforces court rulings (fully, partially, or not at all). Additionally, both the President and members of Congress can try to mobilize the public and interest groups for or against courts and their policies. Clearly, courts are "remarkably dependent on political officials"⁶⁷ who can, if they choose, "severely undermin[e] the judiciary."⁶⁸

For several reasons, however, those checks are rarely invoked formally, making them seem ineffective and giving the appearance of judicial independence. First, as discussed more fully in the next section, there are powerful incentives for the other branches willingly to cede authority and autonomy to the judiciary. The most obvious example is when there exists partisan and ideological congruence between the branches. The conclusion that the judiciary is truly independent is accordingly more

⁶² John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

⁶³ Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 328 (1999).

⁶⁴ Kornhauser, *supra* note 11, at 46.

⁶⁵ *Id.*

⁶⁶ Edward L. Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE, *supra* note 1, at 91.

⁶⁷ Ferejohn, *supra* note 62, at 359.

⁶⁸ Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, in JUDICIAL INDEPENDENCE, *supra* note 1, at 148.

difficult to defend. Another reason the other branches would rarely invoke formal sanctions is if courts acted strategically to avoid inviting a political response.

Ferejohn alerts us to the possibility that although "the federal judiciary is institutionally dependent on Congress and the President, for jurisdiction, rules, and execution of judicial orders" its members may still enjoy decisional independence, being "free to decide the case before [them] without fear or anticipation of (illegitimate) punishments or rewards."⁶⁹ Supreme Court justices would seem to be especially good candidates for decisional freedom, given that they do not aspire to higher office, cannot be overturned by a higher court, enjoy tenure and salary protections, exercise broad discretion in case selection, and deal with highly ambiguous legal issues.⁷⁰

It is true that Supreme Court justices do not face immediate removal (or even lesser penalties) for making a wrong or unpopular decision and, to that degree, enjoy considerable decisional independence. Nonetheless, most Supreme Court justices want their decisions to have a real policy impact, beyond being a discussion topic in a law school classroom. Accordingly, they must behave strategically, accommodating the preferences of others who can enhance or limit policy success.⁷¹ For example, judges on collegial courts must secure enough votes to produce a majority decision. Judges who care deeply about their policy preferences must also consider and accommodate the likely reactions of officials with the discretionary power to implement, ignore, or undermine their decisions. They will also seek to avoid decisional modification by Congress and the imposition of formal sanctions, such as jurisdiction stripping or a refusal to fund judicial salaries and budgets adequately.

There is substantial evidence to support this model of strategic judicial behavior. Interdependent behavior due to endogenous constraints is evident throughout the Supreme Court decision-making process, from case selection to opinion writing.⁷² The Court has at times clearly acted to avoid or soften Congressional opposition.⁷³

⁶⁹ Ferejohn, *supra* note 62, at 355.

⁷⁰ SEGAL & SPAETH, *supra* note 49, at 69.

⁷¹ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 95–111 (1998) (discussing the strategy, reasonableness, implications, and components of judicial decisions); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornwell W. Clayton & Howard Gillman eds., 1999); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (discussing the framework within which judicial decisions are made, including sources and limitations on judicial power, the impact of policy on judicial decisions, and the strategy of judicial decisions).

⁷² FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000) (discussing the implications of strategic judicial decision-making throughout the judicial process).

⁷³ Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in CONTEMPLATING COURTS 315, 318 (Lee Epstein ed., 1995); see also William Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 613 (1991); Rafael Gely & Pablo T. Spiller, *A Rational Choice*

Two of the more obvious examples are when it began upholding New Deal programs in 1937 and when it backed down in protecting civil liberties in the late 1950s. Rosenberg has demonstrated that court-curbing bills, even when unsuccessful, have decisional effects, leading him to reject the claim of judicial independence for the Supreme Court.⁷⁴ The Court is also deferential to the executive branch as seen in the extraordinary access and success enjoyed by the Solicitor General's office.⁷⁵ Political scientists disagree over the force of these strategic considerations in inhibiting Supreme Court justices from voting their sincere preferences.⁷⁶ However, most agree that Supreme Court justices pursue their ideological or policy goals, primarily by voting their preferences but also by accommodating those who can limit policy success.⁷⁷

Certainly, judges are free to ignore strategic considerations and tolerate policy irrelevance or failure, and some do. For example, both Justices Douglas and Scalia have cared little for coalition building within the Court and policy success outside of it. This indeed is the flip side of the coin. Judges can choose, curiously, to be more independent yet less influential. The lesson remains, however: if judges desire policy success, they must acknowledge and accommodate limits on their independence. They must sometimes accede to the wishes of others.

I assume that this third fact—that judges, even Supreme Court justices, do not enjoy complete independence—is the least controversial and the easiest to defend normatively. No one claims that judges have a monopoly on virtue and truth and that they should accordingly be subject to no decisional constraints whatsoever. After all, “wholly unaccountable judges are as likely to deviate from what the law might demand as follow it. Thus, *some* amount of accountability seems essential”⁷⁸

Limited judicial independence additionally resonates with a powerful strain in American political thought. Americans have long been skeptical of government

Theory of the Supreme Court with Applications to the State Farm and Grove City Cases, 6 J.L. ECON. & ORG. 263, 284–96 (1990).

⁷⁴ Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

⁷⁵ See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 19–32 (1987); Jeffrey A. Segal, *Courts, Executives, and Legislatures*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 373–93 (John B. Gates & Charles A. Johnson eds., 1991); LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 569–72 (1994); Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137, 137–52 (1990).

⁷⁶ See Jeffery A. Segal, *Seperation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 28–35 (1997); Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 237–54 (C.W. Clayton & Howard Gillman eds., 1999).

⁷⁷ LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997).

⁷⁸ Stephen B. Burbank, Barry Friedman, & Deborah Goldberg, *Introduction*, in *JUDICIAL INDEPENDENCE*, *supra* note 1, at 3, 4.

power and competence, and they have demanded that all government officials be accountable to the people, directly or indirectly through elections. The common use of judicial elections in the states reflects that impulse.

Political checks rightly insure that federal judges, though not elected, can be reined in if the people and their representatives so desire. Unpopular policy ventures by courts can be and have been checked and even reversed. Such was the case with the anti-New Deal Court of the 1930s. That Court dramatically shifted course in 1937, adopting the rather strange position that the Constitution does not protect economic liberty and that Congress can regulate virtually anything it wants if it can remotely and quite imaginatively be linked with interstate commerce.⁷⁹ The Warren Court was also checked, although in less dramatic fashion. A succession of Republican presidential victories and conservative judicial appointments slowed, and in some cases halted, that Court's egalitarian policy course.⁸⁰

Whether through the laws they write, the judges they select, the judicial decisions they ignore, or the pressure they apply, elected officials can insure that courts will (generally and over time, if not in the individual case) be responsive to the people. This comports with the longstanding requirement in American democracy of political accountability for all government officials.

V. STRUCTURAL VERSUS BEHAVIORAL CAUSES OF JUDICIAL INDEPENDENCE

The final empirical finding of political science to be examined here is that judicial independence is not guaranteed by formal structural protections like life tenure. Rather, political factors, particularly the political incentives facing other officials, are more powerful determinants of judicial independence. Simply put, judges have as much autonomy as politicians are willing to cede them, though that is often considerable.

The causes of judicial independence are not well understood. It is too often simply assumed that formal structural features like tenure and salary protections guarantee an independent judiciary. Research, however, suggests otherwise. For example, Stephenson's review of various comparative studies reveals that formal constitutional protections regarding judicial selection, promotion, tenure, salary, and

⁷⁹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 128, 128–29 (1964); *Katzenbach v. McClung*, 397 U.S. 294 (1964). With regard to the dramatic shift in the Court's views on state regulatory power, see *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁸⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974); *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

budget that other countries have adopted have not insured judicial independence.⁸¹ Furthermore, he finds that “some countries actually give their judiciaries more independence than is strictly required by the relevant formal restrictions.”⁸² Kornhauser finds the British experience instructive.⁸³ He notes that although Great Britain is a parliamentary democracy, lacking separation of powers, and its high court is at least formally a mere parliamentary agency, “British judges are generally regarded as independent; that independence is sustained both by statute and by the political and legal cultures.”⁸⁴ Cameron rejects structural protections as mere “parchment barriers to an aggressive executive or legislature,” pointing to the example of Argentina, where “strong executives have fired high court justices at will, despite legal prohibitions to the contrary.”⁸⁵

Clearly, formal structural protections are an inadequate guide to the degree of independence enjoyed by a nation’s judiciary. The autonomy of judges must be measured independently, and discovering its true causes requires looking beyond formal rules and structural arrangements. Several scholars invite us to examine informal norms, political conditions, and behavioral factors as more likely determinants of judicial independence. For example, Cameron suggests that formal constitutional protections like life tenure must be supported by a political norm that insures punishment for the executive or legislature that tries to remove judges from office, life tenure notwithstanding.⁸⁶ Similarly, Geyh suggests that our understanding of judicial independence can be improved by focusing on “the constitutional customs or norms that Congress employs in deciding whether and how to regulate the third branch,” providing as an example “the *de facto* prohibition on congressional court packing and unpacking.”⁸⁷ Without these social norms and conventions, formal rules supporting judicial independence matter little.

Stephenson reminds us that the idea of judicial independence—“people with money and guns” willingly “submit[ting] to people armed only with gavels”—is quite

⁸¹ Matthew C. Stephenson, *When the Devil Turns: The Political Foundations of Independent Judicial Review* 5 (Aug. 30, 2001), available at <http://pro.harvard.edu/abstracts/026/026009Stephenson.htm>. (unpublished paper presented at the Annual Meeting of the American Political Science Association).

⁸² *Id.*

⁸³ Kornhauser, *supra* note 11, at 47.

⁸⁴ *Id.* (citation omitted). Cameron adds a dissenting voice, however, citing the finding of Salzberger and Fenn that English judges who rule against the government are less likely to be promoted than those who do not. Cameron, *supra* note 5, at 138 (citing Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeals*, 42 J.L. & ECON. 831, 831–47 (1999)).

⁸⁵ Cameron, *supra* note 5, at 139.

⁸⁶ *Id.*

⁸⁷ Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE, note 1, at 160, 161, 167.

puzzling.⁸⁸ He consequently suggests that we look to “the political factors that give the government an incentive to obey the rulings of independent courts.”⁸⁹ He finds that democratic stability and political competition are two political conditions that help to foster judicial independence.⁹⁰ The logic supporting these causal connections is that:

independent judicial review may be a way for parties to minimize the risks associated with uncertain, and ongoing, political competition. Respecting judicial independence may require the party that currently controls the government to sacrifice some policy objectives, but it also means that, when that party is out of power, its opponent faces similar limitations. Parties that ignore unfavorable court rulings when in power risk retaliation in kind when the political winds shift.⁹¹

Franklin urges us to examine the behavioral, and not just the institutional, factors that affect judicial independence.⁹² For instance, he calls judicial reformers to task for failing to understand fundamental facts about the behavioral incentives facing voters, interest groups, and judges in judicial elections.⁹³ For example, we know that “most ballots cast in judicial elections are based only on the most fragmentary knowledge,” particularly in nonpartisan elections.⁹⁴ Without a partisan cue, voters are more easily swayed by a potent interest group appeal that criticizes individual judicial decisions. Additionally, judges must exercise greater and more continuous decisional caution because they have no protective partisan base and cannot predict which particular decision might become an interest group target. In other words, judges subject to nonpartisan elections are *less* independent. In seeking to insulate the judiciary from political influence, reformers have chosen institutions like retention and nonpartisan elections that ironically “make elected judges *more* subject to capricious voters [and] *more* vulnerable to attacks by interest groups.”⁹⁵ Again, the message is that informal, behavioral factors matter greatly when it comes to judicial independence and may undermine the presumed imperatives of formal institutional rules.

Ferejohn, at least initially, finds the stability of judicial independence puzzling, given that “the American system . . . does not really provide much protection for judicial independence, all things considered.”⁹⁶ He too examines political behavior and incentives, speculating why the other branches might willingly grant autonomy to

⁸⁸ Stephenson, *supra* note 81, at 4.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.*

⁹¹ *Id.* at 6–7.

⁹² Franklin, *supra* note 68, at 148–49.

⁹³ *Id.* at 149.

⁹⁴ *Id.* at 151.

⁹⁵ *Id.* at 149.

⁹⁶ Ferejohn, *supra* note 62, at 381.

the judiciary rather than use “their ample constitutional powers to infringe on judicial authority.”⁹⁷ Much of the answer is ideological congruence: “in normal circumstances, the actions of the judiciary are not far out of step with the general policy preferences of the popular branches.”⁹⁸ Why bother attacking and asserting control over an institution that largely supports your policies? By implication, the judiciary is most vulnerable when Congress and the executive are ideologically united but ideologically distant from the judiciary, and evidence supports this logic.⁹⁹ History verifies that such imbalances are rare, but when they occur, courts are indeed at risk, as seen in the early Jeffersonian period, the post-Civil War era, and the early New Deal years. American politics has, however, consisted mostly of stable political rule occasionally interrupted by short-lived realignments. During these lengthy periods of political stability, Congress and the executive will defer to the judiciary because it is considered a regime partner rather than a regime opponent.

Whittington provides a similar inquiry and conclusion regarding the political incentives underlying judicial independence.¹⁰⁰ He argues that presidential assaults on the judiciary are likely to be exceptional.¹⁰¹ It is only “reconstructive” presidents like Jefferson, Lincoln and Roosevelt, appearing during rare periods of realignment, who challenge judicial authority to assign constitutional meaning; they do so as a necessary part of their task of destroying the “collapsing regime” and establishing a new one.¹⁰² More typically, courts serve the self-interests of presidents.¹⁰³ For example, “affiliated” presidents benefit from the ability of courts to overcome impassess within the ruling coalition and to take political heat from voters.¹⁰⁴ “Preemptive” presidents who oppose the existing regime have the law as their only ally and “cannot afford to undermine a potentially helpful institution.”¹⁰⁵

These various scholars help us to see that “formal, structural protections are neither necessary nor sufficient to ensure judicial independence.”¹⁰⁶ Of greater importance are the political incentives of the other branches to grant autonomy to the

⁹⁷ *Id.* at 382.

⁹⁸ *Id.* at 383.

⁹⁹ See Richard Pacelle & Bryan W. Marshall, *Strategic or Sincere? The Supreme Court in Constitutional Decisions 11* (2001), (unpublished paper presented at the Annual Meeting of the American Political Science Association). *available at* <http://pro.harvard.edu/papers/026/026009MarshallBr.pdf>.

¹⁰⁰ Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, in *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE* 261, 263 (Sotirios A. Barber & Robert P. George eds., 2001).

¹⁰¹ *Id.* at 269.

¹⁰² *Id.* at 265, 270–75.

¹⁰³ *Id.* at 269.

¹⁰⁴ *Id.* at 279.

¹⁰⁵ *Id.* at 285.

¹⁰⁶ Cameron, *supra* note 5, at 140.

judiciary. Thus, the historical infrequency of challenges to judicial authority is not proof of the power of constitutional provisions protecting judicial tenure, salaries, and budgets. Instead, politicians permit judicial independence under conditions of inter-branch ideological congruence, a common outcome given stable political rule in the United States. The popular branches will also defer to judicial authority when it serves their self-interests: for example, when courts can help with internal coalition disputes or protect the “in-party” when it temporarily loses power in a competitive electoral system. Judicial independence is thus “politically conditioned” rather than determined by formal rules and structures.¹⁰⁷

This is an especially important lesson for reformers. They have too often relied on a formalistic understanding of judicial independence that rests on assumptions rather than evidence. The end result is policy recommendations like nonpartisan elections or the merit plan that are doomed to fail or that produce surprising and undesirable consequences. As Fiorina and Peterson advise, “If reforms are to be effective, they must take incentives into account. All too often, reformers forget that premise and substitute good intentions and rosy scenarios for realistic analyses. Accurate appraisals of reform require . . . realistic, incentive-based institutional analysis.”¹⁰⁸

Understanding the critical importance of political conditions and incentives for judicial independence leads to the final normative claim to be defended—that courts properly exist within a system of mutual interdependencies. This in turn alerts us to the possibility that assaults on judicial independence can be valuable.

A simplistic Bickelian perspective (*i.e.*, the “counter-majoritarian paradigm”) has for too long dominated normative legal scholarship.¹⁰⁹ In this view, the political branches are majoritarian and dependent on the people, and the judiciary is properly independent of both and can therefore neutrally evaluate a law’s consistency with legal principle. This tendency to see independence as peculiarly judicial has not served us well, however.¹¹⁰

While it is important to understand that judicial independence is limited, it is equally important to understand that so is Congressional independence and presidential independence. American politics, by design and in practice, occurs within a system of mutual institutional interdependencies. Checks and balances insure that no institution, not Congress or the executive or the judiciary, possesses complete and unilateral policymaking authority. Limits on institutional independence are the norm in American democracy. Yet another norm is the nonhierarchical arrangement of those institutions. Congress is not superior to the President, nor the President to the judiciary, nor is the judiciary superior to either. In other words, the legitimacy or

¹⁰⁷ Whittington, *supra* note 100, at 292.

¹⁰⁸ MORRIS FIORINA & PAUL E. PETERSON, *THE NEW AMERICAN DEMOCRACY* 24 (2d ed. 2002) (election update).

¹⁰⁹ Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 937–47 (2001).

¹¹⁰ Rubin, *supra* note 66, at 56–63.

presumptive validity of an institution's decision is not dependent on its proximity to or distance from the people. Each branch possesses the right and the power to check the other and thereby to contribute to policy deliberation and development.

When there is substantial ideological congruence among the branches, policy debate and decision-making proceeds relatively smoothly; when there is substantial ideological divergence among the branches, policy making can be quite fractious. This is both logical and desirable. When a strong consensus exists, inter-branch relations are and should be more harmonious; the government is united in pursuing a broadly-shared policy consensus. However, when the people are deeply divided, inter-branch conflict and clashes are both likely and useful. The process may be messy and include ugly political attacks, but such conflict produces a political dialogue that brings us closer to the consensual resolution of vexing public issues.

Whittington, for example, argues that there is value in the occasional assaults on judicial authority by reconstructive presidents.¹¹¹ He notes that all five reconstructive presidents—Jefferson, Jackson, Lincoln, Roosevelt, and Reagan—“were concerned with re-envisioning the foundations of the American constitutional order.”¹¹² Strong judicial opposition led them to “denounce” and “discredit” the Court, using it “as an important foil for developing their own constitutional visions and for building political support for themselves and their agenda.”¹¹³ While the end result is a weakening of judicial independence, “constitutionalism as such is not threatened. The constitutional regime is reinvigorated through a wider political debate over its content and its future.”¹¹⁴ In other words, “[j]udicial supremacy has given way not when we need it most, but when it is needed least.”¹¹⁵

Serious attacks on judicial independence occur sporadically and for good reason. They are typically an expression of deep conflict within the polity over which values and policy choices should prevail. To the degree that a productive political dialogue ensues and a consensus is reached, then such attacks serve broader public purposes. During such periods, the judiciary is not without its allies in the legal academy and the legal profession who can be counted on to rally to its side. In any case, the judiciary is inevitably brought into line with the consensus that ultimately emerges, and the crisis passes. Judicial resistance serves a valuable function, however. It helps to insure that the old consensus is decisively rejected and the new one carefully and consensually embraced. Of course, legislative and executive resistance to judicial rulings contributes in the same way. Our system of mutual institutional interdependencies insures that no single branch can alone move public policy or constitutional values in a new direction. Instead, policy-making consists of a dynamic process of inter-branch

¹¹¹ Whittington, *supra* note 100, at 275.

¹¹² *Id.* at 274–75.

¹¹³ *Id.* at 275.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 291.

acquiescence, dialogue and, at times, intense conflict. The Court, fortunately, is not above or apart from this inherently political process.

VI. CONCLUSION

Normative discussions of judicial independence have for too long ignored the research conclusions of social science. This unsurprisingly produces fruitless reform efforts, ineffective reforms, and frustrated reformers. Another unsurprising result is intellectual stagnation and the call by some scholars simply to abandon judicial independence altogether as an academic enterprise.

Embracing normatively the social scientific facts about courts reviewed here is not, in my view, such a difficult or dreadful task. We need not be troubled by basic facts about judicial independence—that it is limited and politically conditioned, does not appear to advance human rights, and, at least for higher courts with the most freedom, is used to advance the ideological preferences of judges. These facts are not problematic. Judicial independence that is politically contingent and used for ideological ends insures political accountability, expands interest group representation, and contributes to stable democratic governance. It is furthermore consistent with the system of mutual interdependencies and constraints that the framers intentionally and wisely created. Judicial independence is indeed a misleading concept. Policy development occurs in a dynamic system of mutual political constraints to which all institutions, the judiciary not excepted, are rightly subject.

